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8 NATIONSTAR MORTGAGE LLC

9  
10 UNITED STATES DISTRICT COURT  
11 CENTRAL DISTRICT OF CALIFORNIA

12 ALFRED ZAKLIT AND JESSY  
13 ZAKLIT, individually and on behalf of  
all others similarly situated,

14 Plaintiffs,

15 vs.

16 NATIONSTAR MORTGAGE LLC and  
17 DOES 1 through 10, inclusive, and each  
of them,

18 Defendants.

Case No. 5:15-CV-02190-CAS-KK

**NATIONSTAR MORTGAGE LLC'S  
RESPONSE TO MOTION FOR  
APPROVAL OF CLASS NOTICE**

Date: March 12, 2018  
Time: 10:00 a.m.  
Ctrm.: 8D  
Judge: Hon. Christina A. Snyder

Action Filed: October 23, 2015

19  
20 Defendant Nationstar Mortgage LLC has no opposition to plaintiffs Alfred  
21 and Jessy Zaklit's motion for approval of class notice to the extent it seek approval  
22 of the form and content of the notice. As ordered by the Court, the parties met and  
23 conferred regarding the form of the notices and agreed on their terms.

24 However, Nationstar does oppose the motion to the extent it seeks an order  
25 requiring Nationstar to produce a class list. Having proposed their class definition  
26 for the first time in their reply brief in support of the motion for class certification,  
27 plaintiffs have not conducted sufficient discovery to ascertain persons who fall  
28 within that class. Because the information that plaintiffs have uncovered in

1 discovery thus far is overbroad and does not match the class definition, they ask the  
2 Court to order Nationstar “to produce, within a reasonable time frame, tailored data  
3 for the phone calls that fit within the class definition ....” *See* Dkt. no. 83-1 at 6; *see*  
4 *also* Dkt. no. 83-4. Awarding that relief on this motion would be improper for at  
5 least three reasons.

6 First, plaintiffs never met and conferred about the issue in violation of Local  
7 Rule 7-3. Not once during the parties’ discussions about this motion did plaintiffs  
8 ever say they would also be seeking an order requiring Nationstar to produce a class  
9 list. Plaintiffs’ failure to meet and confer on this issue is in itself sufficient reason to  
10 deny the motion to the extent it seeks production of a class list. *See, e.g., Walter v.*  
11 *W. Indus. Inc.*, No. SACV1301503JLSANX, 2015 WL 12683787, at \*1 (C.D. Cal.  
12 Feb. 25, 2015); *Alcatel-Lucent USA, Inc. v. Dugdale Commc’ns, Inc.*, No. CV 09-  
13 2140PSGJCX, 2009 WL 3346784, at \*4 (C.D. Cal. Oct. 13, 2009)

14 Second, plaintiffs cite no authority requiring the production of a class list on  
15 this motion. Plaintiffs’ motion is based on Fed. R. Civ. P. 23(c), but nothing in that  
16 rule addresses identification of class members or requires the production of a class  
17 list. Plaintiffs cite no other authority permitting the relief they seek. Instead, the  
18 rules leave identification of class members, like all factual issues, to be resolved  
19 through discovery and investigation.

20 Third, plaintiffs advance no reason why this issue cannot be addressed  
21 through discovery and investigation. As plaintiffs acknowledge, *see* Dkt. no. 83-1 at  
22 6, n. 1, they have recently served discovery asking Nationstar to identify class  
23 members. Nationstar intends to respond to the discovery in good faith, but there are  
24 certain elements of plaintiffs’ class definition that cannot be identified from its  
25 records. Accordingly, while Nationstar intends to provide plaintiffs with a list of  
26 borrowers based on the information it can glean from its records, that list will  
27 necessarily be overbroad and not reflect the actual class list.

28 For example, the class definition is limited to borrowers who received

1 outbound calls from Nationstar “while physically present in California and using a  
2 cellular device ...” *See* Dkt. no. 74 at 24. Nationstar has no way of knowing where  
3 any borrower was located when an outbound call to a cellular phone was placed.  
4 While Nationstar may have residential addresses for some borrowers, proof of  
5 address is not proof of location, as the Ninth Circuit recently confirmed in a similar  
6 call recording case. *See Brinkley v. Monterey Fin. Servs., Inc.*, 873 F.3d 1118, 1122  
7 (9th Cir. 2017) (holding call recipients’ addresses were insufficient to prove they  
8 were “located in” California when calls were made).

9        Though Nationstar has no way of determining where any borrower was  
10 located when a call was made, plaintiffs have represented that they have a solution.  
11 Their expert, Gerald Borlin, has opined “upon obtaining cell site location  
12 information for the cell phone calls at issue” from cell phone carriers, he could  
13 determine whether a call was received in California. *See* Dkt. no. 35-3 [Borlin  
14 Decl., ¶¶ 25-26]. Thus, according to plaintiffs’ representations, they should be able  
15 to take the overbroad list Nationstar ultimately produces and identify which  
16 borrowers were physically present in California when calls to their cellular phones  
17 were placed.

18        It is premature for the Court to issue a blanket order requiring Nationstar to  
19 identify class members on this motion, before the parties’ discovery and  
20 investigation on the issue is complete. Nationstar has not yet served its responses to  
21 plaintiffs’ discovery. Plaintiffs’ expert has not yet attempted to determine  
22 borrowers’ locations from cellular tower data. Any disputes about the extent to  
23 which class members can be identified from Nationstar’s records should be resolved  
24 on a more complete record and after the parties have exhausted all efforts to resolve  
25 the matter informally.

26        For the reasons stated, Nationstar does not oppose plaintiffs’ motion to the  
27 extent it seeks the Court’s approval of the form and content of the class notice. But  
28 to the extent that plaintiffs seek an order requiring Nationstar to identify class

1 members, the motion should be denied.

2  
3 DATED: February 16, 2018

SEVERSON & WERSON  
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5 By: /s/ Erik Kemp  
6 Erik Kemp

7 Attorneys for Defendant NATIONSTAR  
8 MORTGAGE LLC  
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